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IN THE COURT OF APPEALS OF INDIANA

JOHNNY WAYT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A05-0511-CR-628
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0310-MR-6

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Johnny Wayt appeals his conviction for Murder,[1] a felony. Specifically, Wayt argues that the conviction must be set aside because the trial court erred in admitting the pretrial statement of a co-conspirator regarding Wayt's involvement in the offense and that the trial court erred in admitting evidence of a prior crime for which Wayt had been acquitted. Finding that the admission of this evidence did not constitute reversible error, we affirm the judgment of the trial court.

FACTS

On February 27, 1997, Rhonda Self drove to Ronald Bruner's residence in Vallonia. The two sat at the kitchen table while Bruner weighed a quantity of methamphetamine and placed the drug in some baggies. At some point, Jim Hauer and John McDonald arrived at the residence, where they smoked some of the methamphetamine. Hauer purchased a baggie of the drug from Bruner and the two of them left approximately twenty-five minutes later.

Later that evening, Bruner attended a gathering at Shannon Weber's residence. Weber was a methamphetamine dealer who had several individuals sell drugs for him. At some point, Wayt, who was also at the party, told Leonard Proffit that he wanted to rob someone and that he needed Wayt's help. Proffit's nephew, Brad, apparently overheard this conversation. Wayt informed several others that there would be drugs and money at Bruner's house. As a result, Proffit, Wayt and Weber drove to Bruner's residence, where they intended to buy some drugs from Bruner or to steal methamphetamine if he was not at home. Proffit had a key to Bruner's house because he had been doing some work for him. Wayt

[1] Ind. Code § 35-42-1-1.

and Proffit entered Bruner's house, emerged a short time later, and Wayt remarked that "it wasn't supposed to happen that way" and that "things just got all messed up." Tr. p. 263-64, 278. They returned to Proffit's residence, where Kenny Beavers saw Proffit stuff some blood stained clothes into a brown paper bag. Proffit then burned the clothes and Wayt remarked to Beavers: "I know you know what happened. Keep your mouth shut. I didn't want to do it but I had to do what I had to do." Id. at 453.

On February 28, George Lebline went to Bruner's residence to complete some work on the outside of the house. At some point, Lebline's brother-in-law, Don Kirts, arrived at the residence. He entered Bruner's residence using a key that Bruner had given him. Kirts had also done some work for Bruner and they had been involved in the drug dealing business together. Once inside, Kirts discovered Bruner's body lying on the floor in a pool of blood, wrapped in a blanket. Kirts checked for a pulse but there was none. Lebline also entered the residence and, upon seeing Bruner's body, contacted the police.

Dr. James Whitler performed an autopsy on Bruner and discovered numerous stab wounds on the body. Dr. Whitler determined that Bruner's death was a homicide and that he died as a result of acute blood loss that was caused by multiple stab wounds to his back, chest, and neck. The police subsequently found shoe prints on Bruner's jeans that were found to match the soles of Wayt's boots.

On October 10, 2003, Wayt was charged with murder and robbery. Following his arrest, Wayt was placed in a cell with Lee Riley and told Riley that "they know [I am] guilty"

and "they know [I] did it." Tr. p. 355, 359. When the trial commenced on November 3, 2004, the trial court granted Wayt's motion for judgment on the evidence as to the robbery count. The trial ended in a hung jury on the murder count for reasons not apparent from the record. Wayt's retrial on the murder count was scheduled for August 22, 2005.

Prior to trial, Wayt filed a motion in limine to exclude evidence relating to the robbery offense for which he had been acquitted. Although the motion was granted, the trial court specified that the State would be allowed to refer to the factual allegations leading to "the event that the Defendant is charged with." Tr. p. 33. At trial, Detective Rick Blaker testified that a robbery charge had been filed against Wayt. Wayt objected, stating that the testimony violated the order in limine. The trial court sustained the objection. Later in the trial, Proffit testified that Wayt tried "to recruit someone to help him rob somebody." Id. at 403. Wayt objected and moved for a mistrial. However, the trial court denied his request and determined that the motion in limine only referred to the charges filed against Wayt and that no violation had occurred. Id. at 407. Weber and Proffit were also permitted to testify about an alleged conversation between Wayt and Bruner that took place while the others were discussing the robbery. Apparently, Proffit told the others that Wayt had informed him that Bruner would not be home for about two hours and that would be the time to go to his house. And according to Proffit's testimony, it was Wayt's idea to commit the robbery and Wayt had solicited Proffit to assist him in the commission of the offense.

Following the presentation of the evidence, Wayt was found guilty as charged and sentenced to a fifty-five-year term of imprisonment. He now appeals.

DISCUSSION AND DECISION

I. Admission of Proffit's Statements

Wayt first contends that his conviction must be set aside because the trial court erred in admitting Proffit's pretrial statements into evidence purportedly demonstrating that Wayt had conspired with the others to rob Bruner. Specifically, Wayt argues that the evidence was inadmissible because the State failed to meet the standard for the admission of co-conspirator statements because no independent evidence of the conspiracy was offered. Hence, Wayt maintains that the State failed to prove by a preponderance of the evidence that a conspiracy existed and that Wayt was a part of that plan.

In addressing this contention, we first note that a trial court's evidentiary rulings are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). A trial court's decision to admit evidence will not be reversed absent a showing of a manifest abuse of discretion that results in the denial of a fair trial. Id.

Next, we note that an out-of-court statement is not hearsay and is admissible against a defendant if the declarant was a co-conspirator of the defendant and the statement was made during the course and in furtherance of the conspiracy. Barber v. State, 715 N.E.2d 848, 852 (Ind. 1999); Ind. Evidence Rule 801(d)(2)(E). However, before a co-conspirator's statements can be admitted, the State must prove by a preponderance of the evidence that (1) a conspiracy existed between the declarant and the party against whom the statement is offered; and (2) the statement was made during the course and in furtherance of the

conspiracy. Barber, 715 N.E.2d at 852.

In accordance with Indiana Code section 35-41-5-2(a), "a person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony." There must be proof that one of the agreeing persons "performed an overt act in furtherance of the agreement." I.C. § 35-41-5-2(b). As this court observed in Leslie v. State,

> The statements must in some way have been designed to promote or facilitate achievement of the goals of the ongoing conspiracy, as by, for example providing reassurance to a coconspirator, seeking to induce a coconspirator's assistance, serving to foster trust and cohesiveness, or informing coconspirators as to the progress or status of the conspiracy . . . or by prompting the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity.

670 N.E.2d 898, 900-01 (Ind. Ct. App. 1996). Additionally, "idle chatter" does not satisfy the "in furtherance" requirement of Evidence Rule 801(d)(2)(E). Id.

We also note that the determination of whether a sufficient foundation has been laid for the admission of a co-conspirator's statement is for the court to decide and not the jury. Siglar v. State, 541 N.E.2d 944, 949 (Ind. 1989). Independent evidence "requires some proof of the conspiracy's existence apart from the statement itself." Robert T. Miler, Courtroom Handbook on Indiana Evidence, Author's Notes to Rule 801, 221 (2006) (citing Barber, 715 N.E.2d at 852). The "independent evidence" requirement is a useful safeguard against abusive use of co-conspirator hearsay." Id.

In this case, Weber acknowledged that "most everybody from Freetown" "hung out" at Proffit's home and "partied." Tr. p. 251-58. When the prosecutor asked Weber if she had any further plans for February 27, 1997, she testified as follows:

> We were going to my house to have a cookout. Me, Leonard, and Johnny and there was some other people coming. And, Leonard had gave Yvonne the rest of the drugs that he had that he needed to sell and money that he owed Ronnie. And, she was supposed to sell them and take the money to Ronnie by 11:00 that night.

Id. at 254-56.

Weber was then asked:

> Q. When you left Leonard Proffit's house on the way to, uh, Vallonia [where Bruner lived] what was your intent?
>
> A. To get more drugs.
>
> Q. Okay. Was there any, uh was it your intent to uh do it and, and get those drugs in any particular manner?
>
> A. If he was home we were going to buy it from him. If he wasn't they were going to steal it.

Id. at 265 (emphases added). When considering the above exchanges along with the other testimony that was offered with regard to an alleged conspiracy to rob Bruner, the trial court acknowledged that it had not heard evidence "that puts Mr. Wayt participating in the establishment of a plan." Id. at 270. Moreover, after this acknowledgement by the trial court, the prosecutor was only able to illicit the following from Weber:

> Uh, while Yvonne was there the plan was she was to sell the remaining drugs and take the money to Ronnie by 11:00 p.m. that night. And, that Ronnie was supposed to be getting another shipment that night of a big amount of drugs sometime after 11:00 p.m. And Leonard and Johnny were going to go to his house and take the money and the drugs that he had left before he made the exchange.

Id. at 273. In considering this testimony, there was no resolution as to whether Wayt actually participated in the establishment of any alleged plan to rob Bruner. Rather, the testimony

only established what Weber was thinking at the time. Hence, we must conclude that such independent evidence—apart from Profitt's statements—offered by the State failed to establish that Wayt was an active participant in an alleged conspiracy to rob Bruner. Thus, because the State failed to lay an adequate foundation for the admission of these statements, the trial court erred in admitting Proffit's statements.

Notwithstanding the error, our Supreme Court has determined that the admission of a co-conspirator's out-of-court statements without a proper foundation is subject to a harmless error analysis. Lander v. State, 762 N.E.2d 1208, 1213 (Ind. 2002). In this case, even when disregarding Proffit's statements, the evidence showed that Wayt had mentioned that there would be drugs and money at Bruner's residence and that he was ready to steal from Bruner. Tr. p. 277, 439-40. After Wayt exited Bruner's house, he commented that "it wasn't supposed to happen that way" and that "things just got all messed up." Id. at 263-64, 266, 278. Once back at Proffit's residence, Proffit and Wayt took a shower and Wayt said, "You almost stabbed me, you son-of-a-bitch." Id. at 278-99. Beavers returned to Proffit's residence several hours later and noticed that the others had returned. Id. at 448. While Beavers noticed that Weber had a large chunk of methamphetamine, she did not have any of the drug in her possession when Beavers had seen her earlier in the evening. Id. at 449. Beavers also saw Proffit place some blood stained pants and a shirt into a bag. Proffit burned the clothes, and Wayt commented to Beavers that, "I know you know what happened. Keep your mouth shut. I didn't want to do it but I had to do what I had to do." Id. at 452-53. After Bruner's body was discovered, the police found shoeprints on Bruner's jeans that

matched the soles of Wayt's boots that were found at his residence. Id. at 476-77.

After examining the record, it is apparent that the jury would have convicted Wayt of Bruner's murder based on the evidence aside from Proffit's testimony. Hence, the admission of Proffit's pretrial statements amounted to harmless error, and we reject Wayt's contention that the remaining evidence only "placed Wayt at Bruner's house in the hours before his murder." Appellant's Br. p. 21. Thus, we decline to set aside Wayt's conviction on this basis.

II. Admission of Evidence Relating to Robbery

Wayt next contends that the trial court erred in admitting evidence of the purported robbery of Bruner in light of Wayt's acquittal for that offense in the first trial. Specifically, Wayt argues that the State should have been collaterally estopped from offering evidence suggesting that Wayt might have participated in the robbery.

We first note that in order to determine whether evidence regarding an acquittal for a criminal offense should be admitted at a subsequent trial, the trial court must (1) determine what facts were necessarily decided in the first trial by examining the prior proceedings and considering the pleadings, evidence, the charge, and other relevant matters; and (2) decide whether the government in a subsequent trial attempted to relitigate facts necessarily established against it in the first trial. Underwood v. State, 722 N.E.2d 828, 833 (Ind. 2000). If the State attempts to relitigate those facts, evidence of the former offense must be excluded. Id.

In this case, Wayt filed a pretrial motion in limine seeking to exclude evidence that

related to the robbery offense. Appellant's App. p. 462. Although the motion was granted, the trial court also specified that the State would be permitted to refer to the factual allegations leading to "the event that the Defendant is charged with." Tr. p. 33.

During the trial, Detective Rick Blaker testified that a robbery charge had been filed against Wayt. Wayt objected, arguing that this testimony violated the order in limine. Tr. p. 364. The trial court sustained the objection and instructed the jury to "disregard that information," but Proffit later testified that Wayt tried "to recruit someone to help him rob somebody." Id. at 403. Wayt again objected and moved for a mistrial. Id. at 404-05. The trial court denied the motion for a mistrial and stated that the motion in limine only referred to the actual charge that had been filed against Wayt and that no violation of the order in limine had occurred. Id. at 407.

Although Wayt urges that the admission of the evidence relating to the robbery was reversible error, the record shows that in the first proceeding, he was charged with robbery rather than conspiracy to commit that offense. Appellant's App. p. 18. As noted above, Wayt's motion for a judgment on the evidence as to the robbery count was granted. Tr. p. 407. Hence, the facts of the conspiracy that ultimately led to Bruner's murder were not necessarily decided at the first trial. Rather, the only issue decided on the robbery count was that based on the evidence, a jury could not find Wayt guilty of robbery beyond a reasonable doubt. Therefore, when the State offered evidence regarding the conspiracy to commit robbery, it was not re-litigating facts that were necessarily established during the first trial. Moreover, the events and conversations leading up to Bruner's murder were relevant to the

instant charge because the co-conspirators' intent to steal from Bruner provided a motive for the murder.[2] As a result, the trial court did not err in admitting this evidence.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.

[2] As an aside, we note that Indiana Evidence Rule 404(b) provides in relevant part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." (Emphasis added).